

March 20, 2023

**Via JZIS**

Board of Zoning Adjustment  
441 4th Street, N.W.  
Suite 210S  
Washington, DC 20001

**Re: Supplemental Submission - BZA Case No. 20867 – 1934 35<sup>th</sup> Place, NW**

Dear Chairperson Hill and Members of the Board:

At the hearing on March 15, 2023, Boardmembers suggested that since the Property could be converted for use as a single-family dwelling with an accessory apartment, that the variance test was not met because the property could then reasonably be used for a conforming use in the R-20 zone. However, the suggested conversion to a single + accessory configuration represents an undue hardship, and is in fact not a conforming use. The Owner is being required to forfeit a valuable property right in order to expand just one of the two principal units. Critically, reducing the number of principal dwelling units potentially puts the Owner in breach of her mortgage agreement, risking the loan being called, forcing an expensive refinancing, if possible. Finally, the accessory apartment use is not a matter-of-right conforming use in the R-20 zone, as conversion to a 1+accessory apartment requires a discretionary special exception approval, which, by definition, carries no guarantee of approval. For these reasons, the property cannot reasonably be used for a conforming use.

Attached to this submission is an affidavit from the Owner, with attachments thereto, which testifies to the difficulties in altering the property in such a way that may constitute a breach of her promises to her mortgage lender.

For the Board to grant use variance relief, “it must be shown that the regulations ‘preclude the use of the property in question for any purpose for which it is reasonably adapted, i.e., can the premises be put to any conforming use with a fair and reasonable return arising out of the ownership thereof?’” *Palmer v. BZA*, at 542, citing 2 A. Rathkopf, *The Law of Zoning and Planning*, Note 21, at 45-5 (3d ed. 1962). In the subject case, the Applicant cannot reduce the number of units given the risk of breach of her Loan Agreement and subsequent impact on

obtaining possible financing for the project, and/or re-financing of the at-risk loan. The Applicant's Building requires substantial upgrades and updates as detailed in the record. These costly updates will require that she increase the rental price of the lower unit. As she testified at the hearing on March 15, 2023, she has been forced to lower the price of the lower unit over the years given the small size and inability to compete with newer apartment buildings in the area. The Applicant will face an undue hardship in attempting to rent the units for a price that would allow her to cover the cost of maintenance of the Building. The relief would allow the Applicant to improve the Building and add value to her Building. This would keep the Property competitive in the rental market. Accordingly, without the relief, the Property cannot be put to any conforming use with a fair and reasonable return arising out of the ownership thereof as maintaining the Building as-is is not an option. Building maintenance without expansion will result in an inability to rent units to cover the cost of maintenance, and as noted, the accessory apartment is not a reasonable, nor a conforming, option.

In the R-20 zone district, pursuant to Further, an accessory apartment is not a matter-of-right use and is therefore not a "conforming use" as quoted in the use variance test. In fact, accessory apartments are permitted as a matter-of-right in every zone *but* the R-19 and R-20 zones, further enhancing the uniqueness of this situation. Because the accessory apartment use is not a matter-of-right in this zone, it is by definition not a conforming use, and it is not appropriate to deny use variance relief based on an assumption that the Owner may simply use these two units as a single-family + accessory apartment going forward, rather than as currently entitled, and mortgaged, as two principal dwelling units.

The Board also raised concerns about the granting of the variance being contrary to the intent and purpose of the regulations noting the Zoning Regulations favored the discontinued use of nonconforming uses. While the Applicant is aware of the case law cited by the Board, from *Lenkin v. Board of Zoning Adjustment*, 428 A.2d 356 (D.C. 1981), newer case law distinguishes between existing non-conforming uses and new non-conforming uses in this context. In *Oakland Condo v. Board of Zoning Adjustment*, 22 A.3d 748, 757 (D.C. 2011). The Board granted a use variance to add 4 rooms to an existing rooming house in a residential zone. The Court of Appeals upheld the Board's decision. Petitioner argued that permitting the increase of 4 additional rooms would be counter to the intent of the Zoning Regulations, but the Board found that the regulations

did not intend to limit the continued use of existing non-conforming uses such as the rooming house in enacting new regulations but rather it intended to limit new uses. Similarly, the intent of the Zoning Regulations is not to eliminate existing non-conforming uses, but only to give the Board a mechanism to control the increase or expansion in either GFA or intensity (in this case GFA).<sup>1</sup> The Board has also granted multiple use variances to increase the intensity of or expand apartment buildings and lodging uses since the 2016 zoning regulations were enacted.

We also think it important to note once again that the nonconforming portion of the property is *not* being expanded at all, and so the purpose and intent of the zoning regulations is intact, as approval of this Application would not only allow the Owner to enjoy its conforming principal dwelling unit and expand and maintain it, but it also does not expand the nonconforming second unit, honoring the purpose of nonconforming use law.

We greatly appreciate the Board taking additional time to review this information, and we hope that the Board finds this information consequential in considering this Application favorably.

Respectfully Submitted,

*Alexandra Wilson*

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<sup>1</sup>The BZA concluded that the “intent of Z.C. Order No. 614, and now, § 330.6, was/is to control the proliferation of *new* daily-occupancy rooming houses in the City. The non-proliferation intent of Z.C. Order 614 is not undermined by the continued use of this rooming house because it is not a new use, but pre-dates Z.C. Order No. 614, and is entitled to operate as a nonconforming use with or without the variance for the four ‘extra’ rooms.” “We owe deference to that interpretation, and ‘may not substitute [our] own judgment [for that of the BZA] so long as there is a rational basis for the BZA’s decision.’ ” *Rodgers Bros. Custodial Servs., supra*, 846 A.2d at 317.

**CERTIFICATE OF SERVICE**

I hereby certify that on March 20, 2023, an electronic copy of this submission was served to the following:

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Respectfully Submitted,

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